United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 20377

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

APPELLANT'S REPLY BRIEF

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STATEMENT

The Government contends that the term "enforcement" in the 1903 Appropriations Act is not language of limitation, and accordingly 15 U.S.C. 32 applies to all Government "proceedings, suits, or prosecutions" under the anti-trust laws, including a damage suit under Section 4(a) of the Clayton Act (15 U.S.C. 15(a)).

It is recited that in 1900 the House Committee recommended immunity be granted in all "prosecutions, hearing and proceedings under the provisions of this Act, whether civil or criminal . . ." and that the subsequent enactment of the immunity provision in 1903, though it failed to extend immunity to "prosecutions, hearing, and proceedings under the provisions of this Act, whether civil or criminal . . .", nevertheless showed a concern of Congress that all types of Government anti-trust proceedings be successful. The argument nowhere analyzes or refutes, the legislative history recited in appellant's opening brief.

Nor do we think that *Kronick v. United States,* 343 F. 2d 426, answers appellant's claim that immunity under 15 U.S. 32 does not extend to proceedings which differ from an anti-trust damage action, in material and substantial requirements of proof. This Court's language in *Kronick* must necessarily be limited to the footnoted issue suggested by the Government in its brief in *Kronick* (Footnote 7, p. 13—Government Brief Kronick). Furthermore, if the question of Grand Jury immunity is irrelevant in this civil proceeding, surely the disclosure of conduct which might divulge a link leading to proof of different or separate crimes subsequent to the period involved in the civil case, is not protected by immunity.

ARGUMENT

Point I.

In its statements directed against appellant's Point I the Government seeks to buttress a policy argument to the effect, that Congress having exhibited a concern

that anti-trust proceedings be successful, must have intended that the term "enforcement" should mean the same thing in degree and measure as applied to all actions of the Government, criminal, equitable, or for damages. This argument fails for two reasons. In the first place, it is cast in the same mold as the contention urged by the Government in *United States v. Cooper Corporation,* 312 U.S. 600, when it contended that United States was a "person" within the meaning of Section 7 of the Sherman Act. And the comment of the Court in denying the contention is sufficient comment here:

> "The Government admits that often the word 'person' is used in such a sense as not to include the sovereign, but urges that where, as in the present instance, *its wider application is consistent with, and tends to effectuate, the public policy evidenced by the statute,* the term should be held to embrace the Government. And it strongly urges that all the considerations which moved Congress to confer the right to recover damages upon individuals and corporations injured by violations of the Act apply with equal force to the United States which, as a large procurer of goods and services, is as likely to be injured by the denounced combinations and monopolies as is a natural or corporate person. *We are asked, in this view, so to construe the Act as not to deny to the Government what public policy is thought to require"* (312 U.S. p. 605). (Emphasis supplied).

Government's argument for extending immunity, based upon the legislative history recited in its brief, contains a reverse twist. It suggests, in support of its position, a legislative history which plainly shows that the Congress with full opportunity to grant immunity in a damage action by the Government failed to do so.

And keeping in mind that recitation of early legislative history, enactment in 1955 of the statute giving the United States the right to recover actual damages in a civil action without mention of immunity, does not imply such a grant. In the light of the courts' aversion, without most compelling reasons, to approve statutes of immunity, it connot be assumed that implied immunity is favored here (Appellant's Opening Brief, p. 36, et seq.).

To apply the same precise meaning and scope to the term "enforcement" is to torture the distinctions and meanings clearly indicated in the usage of the word, in legislative history, judicial opinion and common everyday parlance. In *United States v. General Electric Co.*, 209 F. Supp. 197, where the Court noted the problem of whether or not a civil damage suit by the Government was a *form* of enforcement action, we find the following:

> "Passing the question whether a civil damage suit by the Government is not itself *a form* of enforcement action—as to which, see United States ex rel *Marcus v. Hess,* 317 U.S. 537, 63 S. Ct. 379, 87 L Ed 443 (943)—the duties of Government attorneys are by no means *limited to enforcement proceedings.* The attorneys for the Government in these actions are authorized by statute, to conduct 'any kind of legal proceeding, civil or criminal,' in which the United States is a party in interest. 5 U.S.C.A. Sec. 310. *On principle, it would seem that the United States is no less interested in recouping losses suffered from violations of its laws than in the enforcement of the same laws"* (p. 199) (Emphasis supplied).

And in *United States v. Cooper Corp.,* 312 U.S. 600:

> "In the final analysis, it is probably true that even an Attorney General who might zealously de-

sire to *enforce* the criminal provisions of the Sherman Act would not likely be stimulated to institute civil proceedings for damages unless his attention was directed to the point by keenly alert and diligent purchasing agencies" (Dissent, p. 618) (Emphasis supplied).

United States urges that statutory immunity, 15 U.S.C. 32, should extend to all actions that the term "enforcement" connotes. Such a contention is patently unsound. For example we find in the legislative history of the Government damage statute the following:

> "At the time of the enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of *enforcement* and thus save the Government time and money" *(U.S. Code, Congressional and Administrative News, 84th Congress (1955) Vol. 2, p. 2329)* (Emphasis supplied).
>
> * * * * *
>
> "Enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Sec. 7 of the Sherman Act had not successfully stimulated private litigation for *enforcement* of the Sherman Act (p. 2330) (Emphasis supplied).
>
> * * * * *
>
> . . . "The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to *enforce* a private claim, will nonetheless serve the public interest in the *enforcement* of the anti-trust laws" . . . (p. 2330) (Emphasis supplied).

Turning now to Section 7 of the Sherman Act (amended as 15 U.S.C. 15), we find it to be:

> "An action to recover damages under the anti-trust laws is a civil and not a penal action—a civil action for a private injury, compensatory in its purpose and effect (Toulmins Anti-Trust Laws, Section 16.6, Vol. 6, p. 393).

Can it be argued that had the dissenting opinion in *Cooper,* supra (Justices Black, Reed, Douglas), been the majority opinion, the statutory immunity of 15 U.S.C. 32 would extend to witnesses for the Government, but be denied to the witnesses of private litigants? The answer must be "no." In providing legislation for the purpose of permitting the Government to sue for damages, the Congress did no more than remedy the failure of Section 7 of the Sherman Act, to grant the United States the right to sue for damages, in addition to "any person." It did not extend immunity in the Government's criminal and equitable proceedings to the damage action.

> *"The United States is, of course, amply equipped with the criminal and civil process with which to enforce the anti-trust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." (U.S. Code, Congressional Administrative News, 84th Congress (1955), Vol. 2, p. 2330)* (Emphasis supplied).

And see *United States v. Cooper,* supra, p. 606:

> *"Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser.* It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed

in the light of the relevant material, what was in fact the intent of Congress" (Emphasis supplied).

The Government here is "confounding" powers of the United States as a sovereign with its rights as a "body politic," or more simply as a "buyer of goods":

> "Long ago this Court said, 'a man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense.' (Citation) Congress has 'power to give an action for damages to an individual who suffers by breach of the law' (Citation). And it has this same power when it, rather than some private individual is injured by a fraud. *Quite aside from its interest as preserver of the peace, the Government when spending its money has the same interest in protecting any citizen from frauds which may be practiced upon him. 'The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection'* (Citation) *(United States of America ex rel Marcus v. Hess,* 317 U.S. 537, 549, 550) (Emphasis supplied).

Point II.

Appellant makes no claim that the anti-trust immunity provision is inoperative solely because the anti-trust cause of action in the Government's complaint is joined with a cause of action under the False Claims Act. Rather, appellant urges that proof required to establish violations of the False Claims and Anti-Trust statutes is materially and substantially different. Thus

testimony in a 15 U.S.C. 15(a) action differs wholly in a substantial way from the specific fraud requirements necessary to establish proof of a false claim.

Kronick v. United States, 343 F. 2d 436, did not touch this argument in the fact posture of that case. Thus:

> "The thrust of Kronick's argument on this appeal is that under the unique circumstances of this case he had reasonable cause to apprehend danger if he answered the questions propounded of him at the trial of the civil action, and that the district court erred in holding to the contrary.
>
> "The only danger which Kronick claimed to apprehend was that he would be prosecuted for perjury if he testified in the civil action contrary to his testimony in the prior criminal action" p. 440).

So even if the District Judge erred (CT pp. 30-31), in holding that the civil suit was not an anti-trust action since the First Count of the Complaint was based on the False Claims Act with consequent loss of immunity, we have not adopted either the thesis followed by the District Court, or the conclusion drawn therefrom.

Kronick, supra, is in no way apposite to the present proceedings. In the first place, *Kronick* did not raise the point urged here. Second, the record discloses in *Kronick,* that during the criminal case which was a prelude to the civil action, Kronick testified fully and was characterized by his attorney as a "key" Government witness in the proceedings. Following the criminal case, Kronick was subpoenaed by the United States as an adverse witness in civil proceedings and commenced his testimony as the Government's first witness. Kronick at no time raised the claim of privilege against

self-incrimination. He invoked the Fifth Amendment solely because he feared that his testimony might be the basis for a perjury indictment.

Certainly, this Court in *Kronick,* spoke only to the situation and circumstances presented in that case.

> "Nor does Kronick contend that the immunity provided by Section 32 is inapplicable in the pending civil action because only the second of the two claims involved in the suit invoked the anti-trust laws, the first, an alternative, claim being brought under the Federal Property and Administrative Services Act of 1949. Such a contention would be without merit. The proof necessary to sustain both claims is substantially identical and Kronick's testimony was not separated as between the two claims. Under these circumstances it must necessarily be assumed that all of his testimony is germane to the anti-trust claim and is therefor protected by Section 32" (p. 441).

Kronick, in any event, by testifying, waived any right to invoke the Fifth Amendment. And the record and testimony available to the Court might sustain the Court's determination that the claims in *Kronick* were substantially identical. In the present case, Rutherford has not testified in any judicial proceeding. He has invoked the Fifth Amendment guarantee against incrimination, and he has urged that in the circumstances—the substantial difference of proof between the anti-trust and false claims statutes—he must perforce invoke his immunity against being required to testify in the false claims action. It seems to us that if in proof of a false claims violation a crime is shown to have been committed subsequent to Rutherford's testimony before the Grand Jury, or some link is laid bare which leads to proof connecting Rutherford with a

crime, he is not protected by the Grand Jury immunity. And 15 U.S.C. 15(a) not being an "enforcement" proceeding, appellant is doubly subject to hazard for any testimony elicited, which may show connection with a transaction or act constituting a crime and occurring subsequent to the Grand Jury testimony.

In *United States v. Schmidt,* 204 F. Supp. 540 the Court made it clear that in a false claims action the United States is required to prove fraud in its accepted sense. Thus, there must be a false representation of a material fact, for without such proof there could be no recovery under the False Claims Act. The Government, of course, must rely on the misrepresentation. Neither could the Government prevail unless it showed that there was an intent to deceive. Conscious parallelism would not be the basis of a claim under the False Claims Act. *United States v. National Wholesalers,* (C.A. 9) 236 F. 2d 944).

Unless this Court can say in the present state of the record, that the proof necessary to sustain a claim here made under the False Claims Act and a claim here made under the Anti-Trust Act, is substantially identical, it must sustain appellant's claim.

Point III.

Government contends that appellant's testimony in the pending civil case is given a new and independent immunity under 15 U.S.C. 32 commensurate with the scope of that testimony. Thus, it is argued that the scope of appellant's prior Grand Jury testimony is irrelevant to his obligation to testify under the District Court's order.

We cannot conceive that the scope of claim to immunity here if extended by 15 U.S.C. 32, would be commensurate with testimony that elicited from the witness evidence leading to proof, or a link in proof, of the commission by the witness of acts or crimes following the period of time during which it is claimed in Count I that false claims violations occurred.

In *United States v. Johns-Manville Corp.*, 213 F. Supp. 65, three defendants had testified in 1958 pursuant to subpoenaes, before a Federal Grand Jury which was investigating the cement-asbestos pipe industry. Thereafter, and in 1962, an indictment was returned by another Federal Grand Jury against the defendants. Defendants' claim of immunity was denied. The court held that any immunity which attached as a result of 15 U.S.C. Sec. 32, would not cover any conspiracy or conspiratorial acts subsequent to 1958, and that the record itself did not justify " . . . the assumption that the matters covered in such testimony were 'substantially connected with the transactions in respect of which (these defendants) testified' in April 1958" (p. 75). How then can the immunity statute grant a "new and independent immunity" to testimony of the appellant which involved him in crimes committed subsequent to and following the time, events and proof covered by the false claims count?

If immunity, as claimed by Government, is granted appellant, "commensurate with the scope of his forthcoming testimony in the civil case," and the scope of his testimony as the result of direct, cross-examination or otherwise, details facts which "link" the appellant

with the commission of crimes subsequent to the time, events and proof covered by the civil count, the immunity granted is without limit. Such a contention cannot be sustained, and the apprehension of danger by the appellant is just as real as he asserts.

CONCLUSION

We respectfully submit to the Court that the argument heretofore submitted in the Opening Brief is valid and justifies reversal of the order of the District Court.

Respectfully submitted,
R. MAX ETTER,
Attorney for Appellant

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER